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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN ALEXANDER COLE,

Defendant and Appellant.

H034422

(Santa Clara County

Super. Ct. No. CC803333)

Defendant Ryan Alexander Cole challenges the denial of his motion to traverse the search warrant. After his motion was denied, he pleaded no contest to two counts of assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c)) and one count of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)), and admitted that the assaults were serious felonies (Pen. Code, §§ 667, 1192.7) in exchange for an agreed sentence of three years in state prison. We conclude that the trial court correctly denied defendant's motion, and we affirm the judgment.

**I. Background**

Shortly after 2:30 a.m. on March 23, 2008, California Highway Patrol (CHP) Officers Kenneth Moore and Sergio Nuno observed a green Honda Civic being driven without headlights in San Jose. Moore and Nuno tried to stop the Honda, but it did not yield. The CHP officers followed the Honda and observed that it appeared to contain

“two Hispanic males,” one of whom was wearing a ““Raiders” shirt.’” The Honda went down a dead-end street and attempted to make a u-turn. When the CHP patrol vehicle followed, the Honda stopped.<sup>1</sup> Moore and Nuno exited their vehicle. As Moore approached the driver’s side door, the Honda “reversed,” swerving into Moore and knocking him down. The Honda then moved forward toward Moore, but he was able to avoid it. Both officers fired their handguns repeatedly at the Honda, but it did not stop. At 9:26 a.m., the Honda was found parked in Menlo Park.

The Honda was registered to Maira Serna at an address on Woodland Avenue in East Palo Alto. At 10:31 a.m. on March 23, Serna called the East Palo Alto Police Department and reported the Honda stolen. Serna, who provided the police with her current address of 1213 Jervis Avenue and her cell phone number, told the police that the Honda had been locked and that there were no other keys to the Honda.

San Jose Police Detective Sergeant Michael Brown interviewed Moore at 10:20 a.m. on March 23. Moore, who had been about 10 feet away from the Honda’s driver at one point during the encounter, described the Honda’s driver as “‘a Hispanic male, mid 20s,’” “‘with a thin mustache and goatee, short dark hair (approximately 1/4 to 1/2 inch length),’” and a “round face.” He said that the Honda’s driver was wearing a Raiders jersey. Brown interviewed Nuno an hour later. Nuno described the Honda’s driver as a Hispanic male, “‘early 20s with dark bushy hair approximately four inches, unknown facial hair, wearing a white possible Raiders style jersey with unknown black numbers.’”

On March 24, Serna came to the San Jose Police Department and gave a statement to Brown. This time, she said that she had left the Honda unlocked and with a spare key in the glove compartment. Serna told Brown that defendant was her boyfriend and that

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<sup>1</sup> The following day, a handgun was found “in the vicinity of this event” and turned in to the San Jose Police Department.

he lived “at an unknown address in San Francisco.”<sup>2</sup> Serna described defendant as “‘half black, half white,’ 19 years old, 5’11,” thin (180 pounds) with a thin mustache and a goatee.” After Serna left the police station, she was seen meeting up with defendant three blocks away from the police station. Brown learned that defendant was on probation for a narcotics offense and that he had given the probation department Serna’s Jervis Avenue address as his home address. Defendant had also provided his cell phone number to the probation department.

On March 27, Brown showed Moore a six-person photo lineup containing a photograph of defendant. Moore did not identify defendant as the driver of the Honda, but, when asked if any of the six looked close to the driver, Moore said that defendant “‘had a similar facial structure” to the driver.

On April 1, Brown submitted an application for a search warrant to obtain defendant’s and Serna’s cell phone records. Brown’s affidavit in support of his warrant application omitted the descriptions given by Moore and Nuno of the Honda’s driver, provided no physical description of defendant, and did not mention the photo lineup. Brown’s affidavit stated that defendant “‘has a similar description to the suspect/driver in this case.” The warrant issued on April 17, 2008. Incriminating text messages were obtained through the warrant.

Defendant filed a motion to traverse the search warrant on the ground that Brown had omitted material information and included false information in the search warrant affidavit. The motion alleged that Brown intentionally omitted the officers’ descriptions of the Honda’s driver and any physical description of defendant. The motion also asserted that Brown had falsely stated in his affidavit that defendant “‘has a similar description to the driver/suspect in this case.” Defendant argued that, because Brown

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<sup>2</sup> Serna also told Brown that she let her cousin and defendant drive the Honda, but Brown did not include this information in his affidavit.

knew that defendant was black, and the officers had described the Honda's driver as Hispanic, his statement was false. Defendant maintained that, had the omitted descriptions been included and the allegedly false statement excluded, the affidavit would not have established probable cause to support the issuance of the warrant. In support of his motion, defendant submitted his driver's license photograph and his "CDC" booking photograph, both of which depict him as a light-skinned African American and identify his race as "BLACK." The prosecutor did not dispute the facts upon which the motion was based. Instead, the prosecutor argued that defendant had not satisfied his burden of showing that reformation of the affidavit would eliminate probable cause. The motion was denied.

Defendant thereafter pleaded no contest to all three counts and admitted the serious felony allegations in exchange for an agreed term of three years in state prison. The agreed term was imposed, and defendant timely filed a notice of appeal.

## **II. Discussion**

On a motion to traverse a warrant based on false statements in the affidavit or omissions from the affidavit, an evidentiary hearing is merited if the defendant "makes a substantial showing" that (1) the affidavit contains a deliberately false statement or misleading omission, and (2) when the false statement is excluded and any misleading omissions included, the revised affidavit would not "justify a finding of probable cause . . . ." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297; *People v. Gibson* (2001) 90 Cal.App.4th 371, 381-382.) We exercise de novo review. (*People v. Panah* (2005) 35 Cal.4th 395, 457.)

Defendant's motion was based on both the inclusion of an allegedly false statement and the allegedly misleading omission of material facts. He claimed that Brown's statement in his affidavit that defendant "has a similar description to the driver/suspect in this case" was deliberately false. Defendant also contended that the

affidavit deliberately and misleadingly omitted the officers' descriptions of the driver, and any physical description of defendant. He asserted that those descriptions would have shown that defendant did not match the officers' descriptions because he was African American, not Hispanic.<sup>3</sup>

We are not convinced that, in and of itself, Brown's statement that defendant "has a similar description to the driver" was false. The officers described the driver as a Hispanic male, in his early 20s, with dark hair and a thin mustache and goatee. Serna described defendant as a "half black, half white" male, who was 19 years old and had a thin mustache and a goatee. While these descriptions were not a precise match, it was not unreasonable for Brown to conclude that the officers, who saw defendant at night, inside of a vehicle, under difficult circumstances, had described as "Hispanic" a "half black, half white" man. The fact that defendant, like the driver, had been described as having a thin mustache and a goatee and being around 20 years old, supported Brown's conclusion that the descriptions of the driver and the description of defendant were "similar."

Brown's omission of the actual descriptions of the driver and of defendant was a potentially misleading omission since it deprived the magistrate of knowledge that the driver had been described as Hispanic while defendant had been described as "half black, half white." Nevertheless, the inclusion of these descriptions in Brown's affidavit would not have resulted in the affidavit failing to establish probable cause.

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<sup>3</sup> Although defendant claims on appeal that he was entitled to an evidentiary hearing because Brown also omitted information about Moore's response to the photo lineup, he did not assert this omission as a basis for his motion below, so it is not relevant to our review of the trial court's ruling on his motion. Even if it were, it would make no difference, as Moore's failure to identify a photograph of defendant coupled with his statement that defendant's facial structure was similar to that of the driver was essentially neutral with regard to whether defendant physically matched Moore's recollection of the driver's appearance. The inclusion of information about the photo lineup would not have altered the fact that the affidavit supported a finding of probable cause.

“Probable cause to search exists when, based upon the totality of the circumstances described in the affidavit, ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” (*People v. Farley* (2009) 46 Cal.4th 1053, 1098.) Here, the question was whether, based on the totality of the circumstances described in the affidavit coupled with the omitted descriptions, there was a “fair probability” that defendant was the driver of the Honda and therefore his cell phone records were a likely source of evidence of the crimes. The totality of the circumstances supports such a finding.

Serna, the Honda’s owner, identified defendant as her boyfriend, and provided a description of him that was, to some extent, similar to that of the driver. Defendant, like the driver, was described as having a thin mustache and a goatee. Defendant, like the driver, was described as being around the age of 20. Although defendant was described by Serna as half black and half white, a person who saw such a man only at night, through a car window, under difficult circumstances, might reasonably but mistakenly attribute his apparent skin tone to his being Hispanic. Serna reported the Honda stolen within hours of the offenses, and thereafter provided a patently unconvincing story about the circumstances of the alleged disappearance of the Honda that conflicted with the circumstances she had earlier reported. Serna also claimed that defendant lived in San Francisco even though he had told the probation department that he lived at her address. The fact that Serna met up with defendant several blocks from the police station after providing her misleading statement tended to indicate that Serna’s false statements were associated with defendant.

The totality of these facts, including the similarities between defendant and the driver, Serna’s obviously false claim that her Honda had been stolen, her misleading statements about defendant’s residence, and defendant’s presence nearby when Serna gave her false statements were more than sufficient to support a fair probability that

defendant was the driver of the Honda. Consequently, the court did not err in refusing to grant defendant's motion for an evidentiary hearing.

### **III. Disposition**

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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McAdams, J.